

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS CASE NO. 230490 AND
THE WAYNE COUNTY CIRCUIT COURT CASE NO. 99-918983-CH**

ELAINE A. HAAS and CHARLES J. BANNON,

**Supreme Court
Docket No. 123144**

Plaintiffs-Appellees,

**Court of Appeals
No. 230490**

v

**WADE H. DEAL and SARAH J. DEAL,
Court**

Wayne County Circuit

**TRACEY L. DEAL and J.A. DELANEY & CO.,
a Michigan corporation, jointly and severally,
Defendants-Appellants.**

**No. 99-918983-CH
Hon. Michael J. Callahan**

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**BRIEF ON APPEAL OF DEFENDANT/APPELLANTS'
WADE AND SARAH DEAL**

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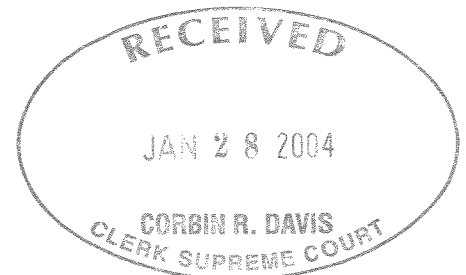


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JURISDICTIONAL STATEMENT AND STANDARD OF APPELLATE REVIEW

A. JURISDICTIONAL STATEMENT.

Jurisdiction over Defendant/Appellants', WADE and SARAH DEAL's, (hereinafter the DEALS), is conferred pursuant to MCR 7.302(A) and an Order of this Court granting leave to appeal which states:

On order of the Court, the defendants' application for leave to appeal the October 22, 2002 judgment of the Court of Appeals is considered, and it GRANTED. The parties shall include among the issues addressed (1) whether a fraud claimant's reliance on an alleged misrepresentation must be reasonable; and (2) whether a fraud claim must be proved by clear and convincing evidence. The plaintiffs' application for leave to appeal is DENIED. (Appendix p.167a).

The DEALS sought leave to appeal from an unpublished per curiam decision of the Michigan Court of Appeals dated October 22, 2002. (Appendix pp.17a-20a). A timely Motion for Reconsideration was filed by the DEALS which resulted in an Order of the Court of Appeals denying said Motion dated January 7, 2003. (Appendix p.21a).

B. STANDARD OF APPELLATE REVIEW.

The DEALS brought their Motion for Summary Disposition under MCR 2.116(C)(8) and (10). The trial court, however, granted summary disposition to the Defendants pursuant to MCR 2.116(C)(8). Defendants submit that summary disposition was appropriate under both subsection (C)(8) and subsection (C)(10).

The appellate court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118 (1999). Additionally, statutory interpretation presents a question of law that is reviewed de novo on appeal. *May v Sommerfield*, 239 Mich App 197, 202 (1999).

Summary disposition under MCR 2.116(C)(8) is available when the plaintiff has failed

to state a claim upon which relief can be granted. A motion under this rule tests the legal sufficiency of the complaint and allows consideration of only the pleadings. All well-pleaded allegations are accepted as true and construed most favorably to the non-moving party. The Court may only grant a motion pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a recovery. *Pawlak v Redox Corp*, 182 Mich App 758, 763 (1990). However, when as in this case, the motion for summary disposition was granted by the trial court in reliance upon depositions and documentary evidence it is properly reviewed under MCR 2.116(C)(10). *Velmer v Baraga Area Schools*, 430 Mich 385, 389 (1988).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. The Court is to consider affidavits, pleadings, depositions, and other documentary evidence submitted by the parties. *Marsh v Dept of Civil Service* (After Remand), 173 Mich App 72, 77 (1988).

Opponents of a motion grounded upon MCR 2.116(C)(10) must show the existence of a factual dispute by submitting opposing affidavits, testimony, depositions, admissions, or other documentary evidence. Opinion evidence, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy this requirement because the existence of a disputed fact must be established by admissible evidence. *Marsh, supra*; citing *Pauley v Hall*, 124 Mich App 255, 262 (1983). As the party opposing summary disposition, Plaintiffs had the burden of showing that a genuine issue of disputed fact exists. MCR 2.116(G)(4) specifies that when a motion under subrule (C)(10) is made and supported as provided in subrule (G)(4), the opposing party may not rest upon mere allegations or denials in his or her pleadings but must, by affidavits or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial.

Marsh, supra at 78.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER UPON A DE NOVO REVIEW REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS' CLAIM OF TRADITIONAL FRAUD BASED UPON FALSE REPRESENTATIONS WAS ERRONEOUS WHEN PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE?**

Plaintiffs/Appellees say "No".

Defendants/Appellants say "Yes".

Court of Appeals answered "No".

- II. WHETHER UPON A DE NOVO REVIEW REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS' FRAUD CLAIMS WAS ERRONEOUS WHEN PLAINTIFFS RELIANCE WAS UNREASONABLE WHEN THE UNDISPUTED FACTS ESTABLISH THE PLAINTIFFS HAD THE MEANS TO DETERMINE WHETHER THE ALLEGED REPRESENTATIONS AS TO THE OWNERSHIP OF AND/OR THE EXPANSION OF THE ADJACENT PROPERTY WERE TRUE?**

Plaintiff/Appellees say "No".

Defendant/Appellants say "Yes".

Court of Appeals answered "No".

- III. WHETHER UPON A DE NOVO REVIEW REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS' THEORIES OF FRAUD REGARDING THE PROPOSED EXPANSION OF THE CEMETERY WAS ERRONEOUS WHEN THE ALLEGED REPRESENTATION RELATED TO A FUTURE EXPECTATION AND PLAINTIFFS' RELIANCE WAS UNREASONABLE?**

Plaintiffs/Appellees say "No".

Defendants/Appellants say "Yes".

Court of Appeals answered "No".

IV. WHETHER UPON A DE NOVO REVIEW THE REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO WADE DEAL ON PLAINTIFFS' SILENT FRAUD CLAIM WAS CLEARLY ERRONEOUS WHEN PLAINTIFFS FAILED TO STATE A PRIMA FACIE CASE?

Plaintiffs/Appellees say "No".

Defendants/Appellants say "Yes".

Court of Appeals answered "No".

V.. WHETHER UPON A DE NOVO REVIEW REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS' CLAIM OF FRAUD BASED UPON INNOCENT MISREPRESENTATION WAS ERRONEOUS WHEN PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE AND COULD NOT PROVE ANY THEORIES OF LIABILITY BY CLEAR AND CONVINCING EVIDENCE?

Plaintiffs/Appellees say "No".

Defendants/Appellants say "Yes".

Court of Appeals answered "No".

VI. WHETHER UPON A DE NOVO A CLAIM OF FRAUD MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE?

Plaintiff/Appellees would answer "No".

Defendant/Appellants answer "Yes".

This was not an issue before the Court of Appeals

INTRODUCTION

Plaintiff/Appellees, ELAINE A. HASS and CHARLES J. BANNON, (hereinafter the Plaintiffs) purchased residential property from the Defendant/Appellants, WADE and SARAH DEAL, (hereinafter the DEALS), in 1998. The DEALS had moved up north and wanted to sell their former residence known as the Fairbrook property, located in Northville. The Plaintiffs filed the instant suit after they purchased the Fairbrook property because a parcel of property near the Fairbrook property was being used as a cemetery. The Rural Hill Cemetery had been in existence for many years. Next to the Fairbrook property was a vacant parcel of land. The vacant parcel of land was not owned by the DEALS. After buying the Fairbrook property from the DEALS, the Plaintiffs learned that Rural Hill Cemetery might be expanded onto the vacant parcel of land that was adjacent to the Fairbrook property. Plaintiffs sought money damages from the DEALS, trying to blame the DEALS for the Plaintiffs' lack of diligence in discovering public information that the DEALS had no duty know, let alone disclose, concerning vacant property that was adjacent to the Fairbrook property.

The decision of this Court will address an issue of major significance to this State's jurisprudence regarding the sale of residential property, and the obligations of both the buyer and seller in consummating a sale of residential property. This Court's decision will guide the general public, the bar, and the bench in addressing future litigation involving the sale of residential property and allegations of fraud.

An examination of the undisputed facts of this case establishes the Court of Appeals' reversal of the grant of summary disposition to the DEALS was clearly erroneous. The Court of Appeals' decision is factually, inferentially and legally erroneous, as will be more fully set forth herein.

STATEMENT OF FACTS

This lawsuit arises out of the sale of the home of the DEALS known as the "Fairbrook property" to the Plaintiffs. On or about September 30, 1998, Plaintiffs were shown the Fairbrook property by real estate agent, Co-Defendant Tracey Deal. (Appendix Bannon Dep. p. 26a). Plaintiffs claim that Tracey Deal was acting as their agent with regard to the purchase of the Fairbrook property. (Appendix Bannon Dep. p. 36a; Appendix Haas Dep. p. 69a).

On October 1, 1998, Plaintiffs signed an Offer to Purchase the Fairbrook property which was submitted to the DEALS. (Appendix Offer to Purchase p.122a-123a). The DEALS accepted the Plaintiffs' offer to purchase the Fairbrook property on October 2, 1998. (Appendix Complaint, ¶48 p.108a).

Plaintiffs allege that on October 5, 1998, Co-Defendant Tracey Deal informed Plaintiffs that the Rural Hill Cemetery located behind the Fairbrook property may be expanding in the future. However, Tracey Deal allegedly told Plaintiffs that the expansion would not be seen from the Fairbrook property. (Appendix Complaint ¶50 p.108a).

On October 25, 1998, more than twenty days after the parties executed the Plaintiffs' Offer to Purchase the Fairbrook property, Plaintiffs met with WADE DEAL. (Appendix Complaint ¶59 p.110a). ELAINE HAAS claims that she asked about the ownership of an undeveloped vacant parcel of land located adjacent to the Fairbrook property. She stated that she was interested in purchasing the parcel to preserve the beauty of it. (Appendix Complaint ¶59-60 p.110a). In response to the Plaintiff's inquiry, WADE DEAL allegedly stated that he thought the vacant parcel was owned by the Township, that it was landlocked, and that Plaintiffs would have to assign easement rights for a third party to purchase this parcel. (Appendix Complaint ¶61 p.110a).

On December 11, 1998, the Plaintiffs closed the sale and purchased the Fairbrook property from the DEALS. (Appendix Complaint ¶¶64 p.110a). Within an hour of the closing, Plaintiffs allegedly went to the Township of Northville Offices to deliver the homestead exemption update. (Appendix Complaint ¶¶66 p.110a). Plaintiffs claim that after inquiring into whether the vacant parcel adjacent to the Fairbrook property could be purchased, a Township representative told them that the parcel was already owned by the Rural Hill Cemetery. (Appendix Complaint ¶¶68-69 p. 110a). Additionally, Plaintiffs claim they subsequently learned the Rural Hill Cemetery proposed an expansion of the improved portion of the cemetery onto the vacant parcel of land adjacent to the Fairbrook property. (Appendix Complaint ¶¶70-71 p.111a).

Plaintiffs claim the DEALS knew or should have known that the cemetery was located behind the Fairbrook property and/or of the proposed future expansion of the cemetery. (Appendix Complaint ¶¶77-78 pp. 111a-112a). Plaintiffs filed the present lawsuit against the DEALS claiming, inter alia, the DEALS were obligated to disclose the existence of the cemetery and the proposed expansion of the cemetery onto the vacant parcel of land adjacent to the Fairbrook property pursuant to the Seller's Disclosure Act. Plaintiffs alleged that WADE and SARAH DEAL are liable for fraud, silent fraud, innocent misrepresentation, and a violation of the Michigan Consumer Protection Act. (Appendix Complaint pp.104a-121a).

On July 14, 2000, the DEALS, moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Co-Defendants, Tracey Deal and J.A. Delaney & Co., also filed a Motion for Summary Disposition on August 4, 2000. A hearing on all the Defendants' motions was held on August 25, 2000. (Appendix Motion Transcript pp. 127a-161a). The Circuit Court granted summary disposition to all Defendants pursuant to MCR 2.116(C)(8). Subsequently, the Circuit Court denied Plaintiffs' Motion for Reconsideration or Rehearing.

Plaintiffs filed an appeal as of right with the Michigan Court of Appeals. After full briefing and oral argument the Court of Appeals issued an unpublished per curiam opinion in this matter on October 22, 2002. The Court of Appeals reversed the grant of summary disposition in favor of the all of the Defendants on Plaintiffs' claims of traditional fraud. As for the claims of innocent misrepresentation, the Court of Appeals upheld the grant of summary disposition to the Co-Defendant Tracey Deal; but, reversed with respect to WADE DEAL. Reviewing the Opinion it was unclear as to whether or not the claim of innocent misrepresentation against SARAH DEAL was reversed. The Court of Appeals affirmed the grant of summary disposition to Co-Defendant Tracey Deal with respect to Plaintiffs' innocent misrepresentation claim because the Court found Ms. Deal was not in privity of contract with the Plaintiffs. Finally, the Court of Appeals held the trial court's grant of summary disposition to all of the Defendants on Plaintiff's claim the Defendants violated the Seller's Disclosure Act, MCL 565.957, based on "silent fraud"; and, the Michigan Consumer Protection Act, MCL 445.903(1) was proper. (Appendix pp. 17a-20a).

The DEALS filed a timely Motion for Reconsideration with the Court of Appeals arguing the Court committed palpable error in its Opinion. The DEALS asserted the grant of summary disposition in favor of the DEALS with respect to the Plaintiff's claims of traditional fraud and innocent misrepresentation should have been affirmed by the Court of Appeals. The Plaintiffs and all of the Defendants filed Motions for Reconsideration. On January 7, 2003, without discussion, the Court of Appeals issued an Order denying all of the Motions for Reconsideration filed. (Appendix p.21a).

SUMMARY OF ARGUMENTS

The undisputed facts of this case reveal that the Court of Appeals was clearly erroneous

when it reversed the grant of summary disposition to the DEALS. The Plaintiffs failed in every respect to establish a claim of traditional fraud, innocent misrepresentation and silent fraud against both WADE and SARAH DEAL, the Defendant/Appellants. The arrangement of the Arguments contained herein establish a chronological sequence of legal arguments necessary to this Court's determination of the specific questions this Court instructed the parties to include among the issues presented in the Defendant/Appellants' Application for Leave to Appeal, which was granted by this Court's Order of December 3, 2003. (Appendix 167a).

In summary, the Plaintiffs decided to purchase a house from the DEALS. After the purchase was consummated the Plaintiffs learned of a plan to expand the cemetery onto a vacant parcel adjacent to the property purchased from the DEALS. The Plaintiffs had the ability to discover this information prior to submitting the Offer to Purchase and prior to the closing on the purchase of the property. Instead of conducting their own investigation prior to the purchase of the property, which would have informed the Plaintiffs of the future plans for the vacant property, which the DEALS did not own; and the information was discoverable from public records, the Plaintiffs seek to impose a duty and liability upon the DEALS that is not supported by the law under any theory.

Plaintiffs' reliance on statements of opinion made by WADE DEAL, only, was unreasonable. Reasonable reliance is a necessary element in any fraud and misrepresentation claim. Plaintiffs failed to establish by a prima facie case of liability under any theory advanced in their Complaint, let alone establish liability by clear and convincing evidence.

ARGUMENTS

I.

UPON A DE NOVO REVIEW THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS' CLAIM OF

TRADITIONAL FRAUD WHEN PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE. REVERSAL BY THE COURT OF APPEALS WAS CLEARLY ERRONEOUS.

A. STANDARD OF REVIEW.

As previously stated at pages 1-3 an appellate court reviews a grant of summary disposition de novo.

B. THE DEALS DID NOT HAVE PERSONAL KNOWLEDGE THAT THE VACANT PROPERTY WAS OWNED BY THE CEMETERY NOR OF THE PROPOSED CEMETERY EXPANSION PLANS. THE OMISSION OF THESE FACTS FAILED TO STATE A PRIMA FACIE CASE OF TRADITIONAL FRAUD AGAINST THE DEALS IN SELLING THE FAIRBROOK PROPERTY.

In Count I of Plaintiffs' Complaint, Plaintiffs allege WADE and SARAH DEAL are liable for traditional fraud based upon false representations. In *M&D, Inc v McConkey*, 231 Mich App 22 (1998), the Court of Appeals set forth the necessary elements to establish a prima facie fraud claim. The Court stated:

As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. 231 Mich at 27.

All the above elements must be found to exist; the absence of any of them is fatal to recovery. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336 (1976).

1. PLAINTIFFS FAILED TO SHOW DEFENDANT SARAH DEAL MADE ANY REPRESENTATIONS OF ANY KIND TO THE PLAINTIFFS TO STATE A PRIMA FACIE CASE OF TRADITIONAL FRAUD.

In the Court of Appeals' Opinion the grant of summary disposition in favor of Defendant SARAH DEAL with respect to Plaintiffs' fraud claims was reversed. Upon a de novo review it

is clear the Court of Appeals' decision as to SARAH DEAL was error and should be reversed. There are no genuine issues of material fact concerning the Plaintiffs' claims against SARAH DEAL. SARAH DEAL never made any statements to the Plaintiffs. The Plaintiffs failed to establish any of the necessary elements for a claim of traditional fraud against SARAH DEAL. The undisputed facts, by the Plaintiff's own testimony, proves SARAH DEAL never met the Plaintiffs and had no conversations with the Plaintiffs at any time about the Fairbrook property, Rural Hill Cemetery, or the vacant parcel adjacent to the Fairbrook property. The Plaintiffs were buying the Fairbrook property. Any statements concerning the cemetery, or the ownership of the adjacent vacant property were made by WADE not SARAH DEAL. Both Plaintiffs testified in their depositions that they never talked to or ever met SARAH DEAL (Appendix Bannon Dep. p. 26a; Appendix Haas Dep. pp. 49a-50a). Plaintiff Haas further admitted she did not have any evidence that SARAH DEAL misled her. (Appendix Haas Dep. p. 50a.). Plaintiff, Charles Bannon also admitted that he never spoke to WADE or SARAH DEAL prior to the time the offer to purchase was accepted. (Appendix Bannon Dep. p. 26a.) Moreover, there were no allegations in the Complaint that Plaintiffs met or talked to SARAH DEAL. Accordingly, Plaintiffs failed to establish any of the necessary elements for a traditional fraud claim against SARAH DEAL. The Court of Appeals completely ignored these facts when it rendered its Opinion and when it denied the DEAL's Motion for Reconsideration. Reversal of the grant of summary disposition in favor of SARAH DEAL was erroneous and should be reversed by this Court.

2. PLAINTIFFS FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT AND ESTABLISH THE NECESSARY ELEMENTS TO STATE A CLAIM OF TRADITIONAL FRAUD AGAINST DEFENDANT WADE DEAL.

The false representation required to establish a claim of traditional fraud must be based

upon a statement of fact and not upon an expression of opinion. *Mieske v Harmony Electric Co*, 278 Mich 61, 66; 270 NW 216 (1936); *Van Tassel v McDonald Corp*, 159 Mich App 745, 750 (1987); *Schuler v American Motors Sales Corp*, 39 Mich App 276, 280 (1972). Further, traditional fraud requires a false representation concerning a past or present fact, not a future one. *Forge v Smith*, 458 Mich 198, 212 n 41 (1998).

In this case, Plaintiffs' Complaint stated:

Defendants or one or more of them represented to Plaintiffs that the Township of Northville owned the cemetery expansion parcel but that it was landlocked and there was no road on which to obtain access unless Plaintiffs agreed to sign off on it. (Appendix Complaint ¶17 p. 106a).

However, at ¶61 of Plaintiffs' Complaint, the Plaintiffs stated:

Wade Deal stated that he thought the Township of Northville owned the cemetery expansion parcel but that it was landlocked and there was no road on which to obtain access unless Plaintiffs agreed to sign off on it, therefore, nothing could be done with the cemetery expansion parcel. (Emphasis added). (Appendix Complaint ¶61 p.110a).

It is clear from Plaintiffs' Complaint that WADE DEAL qualified his statement with the phrase "I think . . ." Therefore, WADE DEAL's alleged representation was an expression of opinion and not a statement of fact. Such an expression of opinion cannot, as a matter of law, support a claim of fraud based on representation. *Mieske, supra*; *VanTassel, supra*; and *Schuler, supra*.

At page 2 of the Court of Appeals' Opinion, (Appendix p. 18a), the Court of Appeals said there were issues of fact for the jury to determine on the Plaintiffs' claims of traditional fraud. The undisputed facts of this case establish that conclusion was clearly erroneous. Plaintiffs failed, by their own pleadings, to establish the necessary elements of a prima facie case of traditional fraud. Therefore, there could be no issue of fact for the jury to decide. The Court of Appeals was clearly erroneous as a matter of law. This Court should reverse the Court of

Appeals' determinations with respect to WADE DEAL. The trial court properly granted summary disposition to WADE DEAL.

3. PLAINTIFFS FAILED TO ESTABLISH THAT WADE DEAL MADE A FALSE "MATERIAL" REPRESENTATION.

In *Zine v Chrysler Corporation*, 236 Mich App 261 (1999), the Court explained the definition of "material" representation as it relates to an essential element in a claim for fraud.

The Court stated:

To be material, the representation need not "relate to the sole or major reason for the transaction, but . . . it [must] relate to a material or important fact." *Papin v Denski*, 17 Mich App 151, 155; 169 NW2d 351 (1969), *aff'd* 383 Mich 561; 177 NW2d 166 (1970). See also *Rzepka v Farm Estates, Inc.*, 83 Mich App 702, 710; 269 NW2d 270 (1978) (holding that the defendant seller's omission of fact was tantamount to a representation and was material because it related to a fact crucial to the plaintiff's decision to buy). *Zine*, 236 Mich App at 283 (emphasis added).

In the present case, Plaintiffs failed to establish WADE DEAL made any "material" representations regarding the residential property being sold by the DEALS. Any representations about the cemetery and/or adjacent vacant parcel were not material to the sale of the DEAL's residential property. Additionally, Plaintiffs never established that WADE DEAL made any representation, whatsoever, regarding the existence of the Rural Hill Cemetery and/or its potential future expansion. Plaintiff, Elaine Haas testified that when she first visited the property, she did not ask WADE any questions about the use of the vacant property or any property that was contiguous or surrounding the Fairbrook property. (Appendix Haas Dep. p. 46a). Plaintiff Haas admitted that she did not ask WADE DEAL about the proposed expansion of the cemetery. (Appendix Haas Dep. p. 60a). She further testified that she never had any conversation with WADE or SARAH DEAL regarding the cemetery. (Appendix Haas Dep. p. 88a). In fact, Plaintiff Haas never even spoke with Defendant SARAH DEAL. (Appendix Haas Dep. p. 49a).

Similarly, Plaintiff, Charles Bannon, testified he had not spoken to either WADE or SARAH DEAL prior to the time the offer to purchase was accepted. (Appendix Bannon Dep. p. 26a). There is no evidence that either of the DEAL Defendants made any material misrepresentations to Plaintiffs regarding the Fairbrook property, which was the property being sold by the DEALS. Any statements made by WADE concerning the vacant property that was adjacent to the Fairbrook property were not material and had nothing to do with the sale of the Fairbrook property.

The DEALS owed no duty to disclose the existence of the cemetery and/or the proposed expansion of the cemetery onto the adjacent vacant parcel on the Seller's Disclosure Statement. (Appendix p.19a-20a). Thus, Plaintiffs failed to establish that Defendants made any assertion, material or otherwise, regarding the existence of the Rural Hill Cemetery or its proposed expansion. The DEALS were not selling the cemetery or the adjacent vacant parcel. The DEALS did not own either of these parcels. The DEALS were selling their residential property and fully disclosed all facts regarding that property to the Plaintiffs through the Sellers Disclosure Statement.

With regard to Plaintiffs' claim that on October 25, 1998, WADE DEAL indicated that the vacant parcel adjacent to the Fairbrook property was owned by the Township of Northville, that it was landlocked and that the Plaintiffs would have to sign easement rights for someone to access the property; these allegations fail to show that the alleged assertions by WADE were "material" representations concerning the Fairbrook property. Again, it must be remembered the DEALS were not selling the cemetery or the parcel adjacent to the DEAL's property. Further, the alleged assertions were made 20 days after the Plaintiffs' Offer to Purchase was accepted by the Defendants.

WADE DEAL testified that he had been told when he purchased the Fairbrook property that the adjacent vacant parcel was owned by the Township. WADE DEAL did not become aware that the adjacent vacant parcel was actually owned by the City of Northville for the cemetery until after this litigation was initiated. (Appendix WADE DEAL Dep. pp. 100a-101a). Plaintiff Haas testified she asked WADE DEAL about the vacant parcel because she was interested in seeing if she could purchase the property. (Appendix Haas Dep. p. 95a-96a). Haas agreed that, regardless of who owned the property, if someone other than an adjacent property owner wished to purchase the property, the owner of the adjacent property would have to get easement rights to gain access to the property. (Appendix Haas Dep. pp. 91a-92a). However, if an adjacent property owner, such as herself or the cemetery, wished to purchase the vacant parcel, there would be no need to sign off easement rights since the adjacent property owner would have access to the property. (Appendix Haas Dep. pp. 63a, 97a-98a). Thus, it was immaterial who owned the adjacent vacant parcel since an adjacent property owner could have purchased the property without requiring any easement rights.

Moreover, Plaintiff Haas admitted she did not personally inquire into the purchase of the adjacent vacant parcel until after the closing on the Fairbrook property. (Appendix Haas Dep. pp. 57a, 58a). Prior to closing, a third party, including the Rural Hill Cemetery, could have purchased the parcel, regardless of its prior ownership. Thus, representations regarding the ownership of the adjacent vacant parcel were not “material” to the sale of the Fairbrook property.

4. PLAINTIFFS FAILED TO ESTABLISH THAT WADE DEAL MADE MATERIAL MISREPRESENTATIONS RECKLESSLY OR WITH KNOWLEDGE OF THEIR FALSITY.

As set forth above, Plaintiffs admitted that they have no evidence or knowledge to establish that WADE DEAL’s alleged representations regarding the vacant parcel were made with

knowledge of their falsity. (Appendix Bannon Dep. p. 32a; Haas Dep. pp. 47a-51a, 54a-55a, 65a-71a, 86a-87a, 93a-94a). Therefore, Plaintiffs failed to establish an essential element of their fraud claim.

The Court of Appeals reversed the grant of summary disposition entered in favor of WADE DEAL finding the Plaintiffs presented evidence which created a genuine issue of material fact for a jury. The question to decide is whether or not WADE DEAL knew the statements concerning the ownership of the vacant parcel of land, adjacent to the DEAL property were false. Specifically, the Court of Appeals stated:

. . . Plaintiffs further allege and provided testimony that defendant Wade falsely told them that the adjoining property was owned by the township and would not be developed. We conclude that there were questions of fact regarding whether these representations were false and material and whether defendants made the statements with reckless disregard for their truth or falsity.²

* * *

² While **plaintiffs did not offer direct proof of defendants' knowledge that their statements were false, there were public meetings regarding the expansion of the cemetery, and plaintiffs claimed the sellers' neighbors were aware of it.** Moreover, an earlier prospective buyer of the house in question testified that she told **Tracey** that the cemetery planned to expand onto the land near the home. Plaintiffs adequately raised a question of fact regarding this element of fraud. (For clarification for the reader, this quote is from the Court of Appeals' decision which is contained a footnote and the footnote is cited after the * * *). (Emphasis added). Appendix p. 18a).

As stated previously, traditional fraud requires a false statement of a material fact that the Defendant knew was false or made in reckless disregard for its truth or falsity, that the Defendant intended to make the Plaintiffs rely on the statement, **and the Plaintiffs reasonably relied on the statement suffering damages as a result.** *M & D, Inc, supra* at 27. A review of the Circuit Court and the Court of Appeals record reveals the statements contained in footnote 2 of the Court of Appeals' Opinion are factually inaccurate. Specifically, the Court of Appeals stated "[A]n earlier prospective buyer of the house told **Tracey** the cemetery planned to expand."

(Appendix p. 18a, fn. 2). As the Verified Complaint of the Plaintiffs and the Affidavit of the prospective buyer, Patricia Thull, attested, Mrs. Thull, submitted an offer to purchase to the DEALS on the same day as the Plaintiffs. (Appendix Complaint ¶¶ 30, 31, 47, pp. 197a-108a; Affidavit of Thull pp. 124a-126a). Thus, Mrs. Thull was not "an earlier prospective buyer." She was a concurrent prospective purchaser. According to the Thull Affidavit, the cemetery expansion information was provided to Tracey, not WADE and SARAH DEAL. Plaintiff Haas testified she has no evidence that WADE or SARAH were given the information that Thull provided to Tracey Deal. Mrs. Thull provided the information to Tracey on the same day that Thull and the Plaintiffs presented their offer to purchase to the DEALS. (Appendix Complaint ¶¶13, 14, 15 pp. 105a-106a; Haas Dep. p. 52a; Thull Affidavit pp. 124a-126a). Tracey Deal provided the Thull information to the Plaintiffs well before the closing and before the Plaintiffs' conversation with WADE DEAL. The Plaintiff did not talk to WADE DEAL until 20 days after they submitted their offer to purchase the Fairbrook property. Accordingly, the Court of Appeals decision on this issue is based on clearly erroneous facts. The statements contained in footnote 2 of the Court of Appeals' Opinion do not establish genuine issues of material fact with respect to the third and fourth elements necessary to state a claim of traditional fraud. In other words, the statements in footnote 2 do not create a genuine issue of material fact as to whether or not WADE DEAL's representations concerning the adjoining vacant parcel were made by WADE with knowledge of the falsity, or in reckless disregard for the truth. Nor do the facts in footnote 2 establish WADE DEAL intended the Plaintiffs to rely on the statements when the Plaintiffs decided to purchase the Fairbrook property.

In Plaintiff's Verified Complaint, paragraph 61, Plaintiffs allege WADE DEAL "**thought**" the Township of Northville owned the adjacent vacant parcel of land. (Appendix Complaint ¶

61, p. 110a). WADE DEAL's deposition testimony establishes he told Haas he **thought** the adjacent vacant parcel was owned by the Township. (Appendix WADE DEAL Dep. pp. 101a-103a). This testimony was not contradicted by either of the Plaintiffs. In fact both Plaintiffs' deposition testimony establish just the opposite. Both of the Plaintiffs' deposition testimony establish that WADE DEAL was merely expressing an opinion as to the ownership of the vacant adjacent parcel of land next to the Fairbrook property which was the **only property the Defendants owned and being sold by the Defendants**. (See Appendix Bannon Dep. pp. 31a-34a; Haas Dep. pp. 47a-48a, 55a). By the Court of Appeals' own acknowledgment, Plaintiffs presented no direct evidence that WADE DEAL knew his statements were false. The fact that there were public meetings regarding the expansion of the cemetery does not establish the WADE DEAL knew his thoughts were incorrect; especially when he was no longer living in the area and instead was living in northern Michigan. Under the undisputed facts it does create a genuine issue of material fact for the jury to determine. The Plaintiffs never presented any evidence that WADE and/or SARAH DEAL ever had knowledge of the public meetings or attended the public meetings, **as Plaintiff Haas' own deposition testimony establishes**. (Appendix Haas Dep. p. 47a-48a). Furthermore, the correspondence the Plaintiffs relied upon in the Circuit Court and the Court of Appeals concerning the expansion of the cemetery **were correspondence between the Township and the City of Northville, not the DEALS!** In addition, this correspondence was written **after** the offer to purchase was presented and accepted. This correspondence was **dated after the closing on the Fairbrook property**. Finally, the fact that the DEAL's former neighbors may have known about the cemetery expansion does not establish, or reasonably infer, that the DEALS knew of the expansion plans. Again, especially since the DEALS were living up north. The Court of Appeals overlooked the undisputed facts that the DEALS were living up

north at the time of the public meetings regarding the expansion of the cemetery. As a result the DEALS were not in the same position to have knowledge of the meetings as their neighbors.

5. PLAINTIFFS FAILED TO ESTABLISH THAT WADE DEAL MADE THE ALLEGED REPRESENTATIONS WITH THE INTENTION THAT THE PLAINTIFFS WOULD ACT UPON THEM AND THAT PLAINTIFFS ACTED IN RELIANCE ON THE ALLEGED REPRESENTATIONS.

In Plaintiffs' Complaint, Plaintiffs claimed that they would not have entered into the offer to purchase if Defendants had not made the alleged representations concerning the adjacent vacant parcel. (Appendix Complaint ¶106 p. 115a). In any event it is well established that fraudulent representations are only actionable if the Plaintiffs reasonably relied upon them. In addition, the Plaintiffs' reliance is impossible since the written Offer to Purchase was accepted 20 days before the alleged representations. *M&D, Inc, supra; Kimble v Gillard*, 177 Mich 250, 257 (1913).

In *Novak v Nationwide Mut Ins Co*, 235 Mich App 675 (1999), the Court held the plaintiff failed to establish an actionable fraud claim based on the representation to him that he would receive certain commissions. The court concluded the representations made to the plaintiff regarding the payment of commissions occurred after the plaintiff signed the contract. Therefore, the plaintiff could not have relied upon the representation when signing the contract.

Similarly, the Plaintiffs' Complaint (Appendix Complaint ¶¶ 55-61 pp. 109a-110a) and the evidence in this case established the Plaintiffs did not act in reliance upon the representation of WADE DEAL as to the ownership of the adjacent vacant parcel of land in conjunction with the signing of the offer to purchase. The alleged statements of WADE were made 20 days after the Offer to Purchase had been submitted by the Plaintiff and accepted by the DEALS. WADE DEAL made the alleged representations on October 25, 1998. The Offer to Purchase was submitted by the Plaintiffs on October 1, 1998. The DEALS accepted the offer on October 5,

1998. The sale of the Fairbrook property was closed on December 11, 1998. These facts are not in dispute. (Appendix Bannon Dep. p. 27a, 29a; Haas Dep. pp. 44a-45a, 53a 56a, 61a-62a, 72a-75a, 88a-90a; Appendix Complaint ¶49 p. 108a). Thus, Plaintiffs were **legally bound** to purchase the Fairbrook property as of October 5, 1998. Plaintiff Haas admitted at her deposition that at the time WADE DEAL allegedly made the representations regarding the vacant parcel, Plaintiffs already had a "legal deal" to purchase the Fairbrook property. Haas' testified as follows:

Q. Ok. This was on October 25, 1998?

A. Right.

Q. Twenty days after you and Wade and Sarah Deal and your husband entered into a transaction for the purchase of that Fairbrook property? Correct?

A. Correct.

Q. **You'd already had a deal.**

A. **That's correct. We had a legal deal.** (Haas Dep. pp. 61a-62a).

Plaintiffs could not have acted in reliance upon the alleged statements made by WADE DEAL on **October 25, 1998**, when they signed the offer to purchase and had it presented to the DEALS. Given the Plaintiffs' own deposition testimony it is clear these undisputed facts establish any reliance upon the alleged representations was unreasonable.

6. ANY CLAIMED RELIANCE UPON THE ALLEGED STATEMENTS OF WADE DEAL BY THE PLAINTIFFS WAS UNREASONABLE.

In this Court's Order granting leave to appeal, this Court instructed the parties to include among the issues to be briefed "whether a fraud claimant's reliance on the alleged misrepresentation must be reasonable; . . . ". The DEALS assert case law clearly establishes any reliance upon a misrepresentation must be reasonable. *Law Offices of Lawrence J Stockler, PC*

v Rose, 174 Mich App 14, 30 (1989); *Webb v Malmquist*, 195 Mich App 470, 474 (1992).

Fraud is generally defined as "all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another . . . " *General Electric Crop v Wolverine Ins Co*, 420 Mich 176, 189 (1984) (quoting 37 CJS, Fraud, § 1, p 204). "Fraud" encompasses both actual fraud-an intentional perversion of the truth-and constructive fraud-an act of deception or a misrepresentation without an evil intent. *General Electric Credit Corp, supra* at 188-189. "Fraud" may be committed by open false assertions or by suppressing facts, i.e., silent fraud. *Hord v Environmental Research Institute of Michigan, (After Remand)*, 463 Mich 399, 412 (2000), quoting *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125 (1981). In the case of silent fraud, mere nondisclosure of facts is insufficient. *Hord, supra* at 412. Rather, there must be circumstances that establish a legal duty to make the disclosure. In this case, both the Circuit Court and the Court of Appeals determined that neither WADE or SARAH DEAL had a duty to disclose any possible plans of expansion of the cemetery, nor the ownership of the vacant parcel. Also it is clear from the established undisputed facts, set forth in the Plaintiffs' own Complaint and deposition testimony, that SARAH DEAL made no representations to the Plaintiffs at any time. Any representations made by WADE DEAL came after the time in which the Plaintiffs had legally obligated themselves to purchase the property. Further, the Plaintiffs had the means to determine if the cemetery was going to expand and the ownership of the vacant property through public records. No evidence was ever presented by the Plaintiff to establish the DEALS prevented the Plaintiffs from discovering the information they now complain of with respect to the cemetery expansion and the ownership of the vacant parcel.

The Court of Appeals incorrectly held the question of whether or not the Plaintiffs

reasonably relied on WADE DEAL's statements was a question for the jury. Specifically, the Court of Appeals stated:

Additionally, it is reasonable to assume the defendants intended to make plaintiffs rely on the statements, that plaintiffs did rely on the statements,³ and that plaintiffs suffered damages as a result.

* * *

³ While Wade's alleged misstatement (but not Tracey's alleged misstatements) occurred after the purchase agreement was signed, plaintiffs nonetheless acted further to their detriment by going through with the closing. (Appendix p. 18a).

The DEALS submit the above-quoted language completely ignores the fact that between October 25, 1998, and the date of the closing, December 11, 1998, the Plaintiffs had ample opportunity to conduct their own investigation as to the ownership of the vacant parcel, the existence of the cemetery, and the plans to expand the cemetery onto the vacant parcel through the public records of both the City of Northville and the Township of Northville. It is unreasonable to assume WADE DEAL intended the Plaintiffs to rely on his **thoughts and opinions** regarding property **he did not own and was not selling**. It is unreasonable to assume the Plaintiffs would not do their own investigation as Mrs. Thull did. This is especially true in view of the fact that the Plaintiffs' own Verified Complaint, ¶50 states that on **October 5, 1998**, Tracey told the Plaintiffs the cemetery might expand in the future. (Appendix Complaint ¶ 50 p. 108a). Moreover, WADE's **thoughts** about a vacant parcel of land that he was not selling and did not own were not material to or a part of the sale of his property.

The terms of the Offer to Purchase expressly provide that no oral representations are to be considered a part of the sale agreement. Paragraph No. 20 of the offer to purchase signed by Plaintiffs provides:

20. This agreement supersedes any and all understandings and agreements and constitutes the **entire agreement** between the parties hereto . . . and **no**

oral representations or statements shall be considered a part hereof.
(emphasis added). (Appendix Offer to Purchase ¶20 p. 106).

Since the executed Offer to Purchase provides that no oral representations or statements are to be considered as part of the sale of the property, Plaintiffs could not rely upon the oral representations allegedly made by WADE DEAL. WADE DEAL's belief the Township owned the vacant parcel was reasonable since he was told the Township owned the property when he bought the Fairbrook property. WADE DEAL owed no duty to the Plaintiffs to know the ownership of the vacant parcel or any expansion plans of nearby property.

Given the fact that the Plaintiffs were told about the possible expansion of the cemetery on the day they signed their Offer to Purchase and before the closing, coupled with the Plaintiffs' expressed desire to purchase the vacant parcel, Plaintiffs' reliance on the statements of WADE was unreasonable as a matter of law. The Court of Appeals wrongly inferred that WADE DEAL knew what his former neighbors knew, or that he knew what occurred at the public meetings. The Plaintiffs never presented any evidence that WADE DEAL knew of the public meetings or attended them. To conclude the issue of reliance was a question for a jury to determine is clearly erroneous based on the undisputed facts of this case.

At page 2-3 of the Court of Appeals' Opinion the Court stated:

It is a more difficult question whether the plaintiffs *reasonably* relied on the statements, when they could have determined the facts concerning the adjacent property by themselves. Reliance can be unreasonable as a matter of law. See, e.g. *Novak, supra* at 691. However, unlike the defendants in *McMullen v Joldersma*, 174 Mich App 207, 216; 435 NW2d 428 (1988), defendants in the present case allegedly made actual misstatements, and unlike the plaintiffs in *Nieves, supra* at 464-465, plaintiffs in the present case did not have the correct information in hand. Given this distinguishing case law, we conclude in this de novo review that under the circumstances of the present case, the reasonableness of the plaintiff's reliance was more appropriately a jury question. . . . (Emphasis in the original). Appendix pp. 18a-19a).

As the Court of Appeals Opinion recognized at page 2 of its Opinion, reliance can be

unreasonable as a matter of law. *Novak v Nationwide Mut Ins Co, supra* at 691. This Court held in *Novak* if oral statements are made to induce a plaintiff to enter into a written contract which contain an integration clause or merger clause, the clause will render a plaintiff's reliance unreasonable. *Novak, supra* at 689-691.

In *Nieves v Bell Industries, Inc.*, 204 Mich App 459, 464 (1994), [T]here can be no fraud where a person has the means to determine that a representation is not true." *Montgomery Ward & Co v Williams*, 330 Mich 275 (1951); *Webb, supra* at 474. The Plaintiffs had the means to determine the ownership of the adjacent vacant parcel as well as the expansion plans for the cemetery. The Plaintiffs failed to do their own investigation into the ownership of the vacant parcel. The Plaintiffs were given information from the realtor, Tracey Deal, which should have put them on notice to conduct their own investigation regarding the ownership of the vacant parcel as well as any plans to expand Rural Hill Cemetery. Mrs. Thull conducted her own investigation prior to submitting her offer to purchase on the same day the Plaintiffs presented their offer to purchase. Clearly, the Plaintiffs failed to conduct their own investigation prior to purchasing the Fairbrook property. Once the Plaintiffs did conduct their own investigation, they were unhappy with the information they learned; but, the DEALS committed no fraud upon the Plaintiffs since the DEALS did not have the same information the Plaintiffs eventually obtained.

6. PLAINTIFFS FAILED TO ESTABLISH THAT THEY SUFFERED DAMAGES AS A RESULT OF THE ALLEGED MISREPRESENTATIONS.

Plaintiffs were not damaged by completing the purchase of the Fairbrook property since, as set forth above, Plaintiffs were already legally bound to purchase the Fairbrook property at the time Defendant WADE DEAL made the alleged representations regarding the adjacent vacant parcel. Thus, Plaintiffs failed to establish the required elements of a fraud claim. The Plaintiffs

received everything they bargained for—the DEAL homestead. There was no bargain for the vacant parcel the DEALS did not own.

II.

UPON A DE NOVO REVIEW THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS' FRAUD CLAIMS WHEN PLAINTIFFS HAD THE MEANS TO DETERMINE WHETHER THE ALLEGED REPRESENTATIONS REGARDING THE UNIMPROVED PARCEL ADJACENT TO THE FAIRBROOK PROPERTY WERE TRUE. ANY RELIANCE UPON THOSE STATEMENTS WAS UNREASONABLE. REVERSAL BY THE COURT OF APPEALS WAS CLEARLY ERRONEOUS.

A. STANDARD OF REVIEW.

Defendants reassert and incorporate herein by reference the standard of appellate review set forth herein at pages 1-3.

B. PLAINTIFFS HAD THE MEANS TO DETERMINE WHETHER THE ALLEGED REPRESENTATIONS REGARDING THE UNIMPROVED PARCEL ADJACENT TO THE FAIRBROOK PROPERTY WERE TRUE, THEREFORE ANY RELIANCE UPON THE STATEMENTS MADE BY WADE DEAL WAS UNREASONABLE AS A MATTER OF LAW.

It is well-settled that when the means of knowledge regarding the truthfulness of a representation are available to the plaintiff, the plaintiff cannot maintain an action for fraud. In *Webb, supra* at 474 (1992), the Court held:

[T]here can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.

Similarly, in *Nieves v Bell Industries, Inc, supra*; the Court held that the trial court erred in failing to dismiss the plaintiff's innocent misrepresentation claim since the plaintiff had the means to determine that an oral representation allegedly made by the defendant was not true. The Court explained that "[t]here can be no fraud where a person has the means to determine that

a representation is not true.” *Nieves* at 464.

In *McMullen v Joldersma*, 174 Mich App 207 (1988); the Court affirmed a judgement of no cause of action in favor of the defendant in a case similar to the present case. In *McMullen*, the defendants sold their party store to plaintiffs on a land contract. The plaintiff purchasers filed suit alleging that defendants fraudulently concealed the alleged material fact that the State of Michigan had plans to construct a highway bypass which would substantially divert other highway traffic away from the party store. The testimony in that case established that such information was a matter of public record and had been so for years. Although the plaintiffs’ claimed that they should not be charged with knowledge of the public record regarding the bypass plans, the Court stated that failure to disclose the plan had no impact on the property title, per se. In affirming the no cause of action judgment, the Court held that “[A] reasonable inquiry would have revealed the existence of the bypass project.” See also *Schuler v American Motors Sales Corp*, *supra*.

Similar to the above-cited cases, in the present case Plaintiffs clearly had the means to determine the location of the Rural Hills Cemetery in relation to the Fairbrook property; who owned the subject vacant parcel of land; and whether the Rural Hills Cemetery was proposing an expansion of the cemetery onto that parcel. First, Plaintiffs unquestionably could have determined the existence of the Rural Hill Cemetery since it is located off of Seven Mile Road, which Plaintiffs admittedly drove down to reach the Fairbrook property prior to the time an offer was made to the Deals on this property. (Appendix Bannon Dep. pp. 24a-25a; Haas Dep. p.77a). Plaintiff Bannon admitted that he and his wife did not take the opportunity before signing the offer to purchase the Fairbrook property to drive around the area and see what was surrounding the home. (Appendix Bannon Dep. p. 28a). Plaintiff Haas further admitted that on the five

occasions prior to closing that she was at the Fairbrook property, she did not drive around the area to see who her neighbors were and what the surrounding property looked like. (Appendix Haas Dep. pp. 77a-78a).

Plaintiffs' testimony further proves that they had the means to determine who owned the subject vacant parcel of land adjacent to the Fairbrook property. Elaine Haas testified that she first learned that the subject vacant parcel was owned by the City of Northville for the cemetery on December 11, 1998, after closing on the Fairbrook property. However, she admits that she could have gone to the Township at any time from September 30, 1998, the date she first saw the property, through December 11, 1998, the date of closing, and asked the same question regarding the subject vacant parcel. (Appendix Haas Dep. pp. 57a-59a). Similarly, Plaintiff Bannon testified that at the time he went to the Rural Hill Cemetery prior to the closing on the Fairbrook property, he could have made an inquiry regarding who owned the vacant parcel of land. However, he did not speak to anyone at the cemetery or call anyone at the City of Northville or Township of Northville to make such inquiry. (Appendix Bannon Dep. p. 37a, 41a-42a). Charles Bannon admitted that "it was possible to find out more had [they] inquired further." (Appendix Bannon Dep. p. 39a).

Additionally, at the hearing of the Motion for Summary Disposition, Plaintiffs' attorney, Mr. Sundquist, disclosed that there was a 1971 survey in possession of the Township showing the existence of Rural Hill Cemetery. Mr. Sundquist acknowledged that the survey was a matter of public record. (Appendix Motion Transcript, pp. 141a-142a).

Further, the Defendants had no duty to disclose information when the Plaintiffs had the means to determine whether the alleged representations regarding the unimproved parcel adjacent to the property were true or not and when the information was undeniably a matter of public

record. See *Webb, supra*; *McMullen, supra*; *Nieves, supra*; *Montgomery Ward & Co v Williams, supra*.

Case law has also established that an action for fraud cannot be predicated upon representations or omissions regarding a future possibility or event. *McMullen, supra*. Thus, the Defendant WADE DEAL's alleged failure to inform Plaintiffs about the proposed cemetery expansion project did not constitute actionable fraud as a matter of law.

Additionally, the essential elements of a fraud claim, i.e. material false representation and reliance, were not met. Plaintiffs' Complaint and the undisputed evidence showed that the Defendant WADE DEAL "thought" or "believed" that the adjacent vacant property was owned by the Northville Township. An actionable fraud requires a representation of facts, not an expression of opinion. *Mieske, supra*. In this case, by qualifying their statement with "I think" or "I believe," the Defendants were merely expressing an opinion which is insufficient to support a fraud claim as a matter of law. Furthermore, in this case, based on the allegations in Plaintiffs' Complaint, there was no reliance by the Plaintiffs on the alleged representations of the Defendants. Plaintiffs alleged in their Complaint that they would not have entered into the offer to purchase if Defendants had not made the alleged representations concerning the adjacent vacant parcel. (Appendix Complaint ¶106 p. 115a). However, the Complaint states that "On Friday, October 2, 1998, Plaintiffs' offer [to purchase] was accepted by the Deals." (Appendix Complaint ¶48 p. 108a).

The Complaint further states that WADE DEAL made the representations on October 24 or October 25, 1998 when the Plaintiffs met with Wade Deal to view the property. (Appendix Complaint ¶59-63 p. 110a). Thus, Defendant WADE DEAL allegedly made the representations more than 20 days after the Plaintiffs had already executed the offer to purchase. Since the

Plaintiffs were already legally required to purchase the property on or about October 2, 1998, Plaintiffs could not have acted in reliance upon the alleged representations made by WADE DEAL on October 25, 1998 in entering into the offer to purchase. Thus, in reaching this conclusion, the trial court properly relied on the allegations in Plaintiffs' Complaint and the undisputed facts and did not make any credibility determination. The Court of Appeals reversal in this matter was clearly erroneous.

Finally, with regard to the proposed expansion of the Rural Hill Cemetery onto the subject vacant parcel, Plaintiffs admit that even after they learned of a proposed expansion, they failed to make further available inquiry which would have revealed the scope of the expansion. Elaine Haas testified that when she learned on October 5th that there was going to be a cemetery expansion, she did not make further inquiry to the City of Northville or Township of Northville. (Appendix Haas Dep. p. 79a). Elaine Haas further admitted that, like Patricia Thull, she and her husband could have gathered information for themselves regarding the cemetery and its proposed expansion. (Appendix Haas Dep. p. 80a). Charles Bannon testified that there is public knowledge available regarding the expansion of the cemetery and a person could do research to discover the existence of the cemetery and the vacant parcel. (Appendix Bannon Dep. pp. 39a-40a). He admitted that it was within his ability to find out about the cemetery expansion parcel and the cemetery prior to purchasing the Fairbrook property. (Appendix Bannon Dep. p. 42a).

Since Plaintiffs admittedly had the means to determine where the Rural Hill Cemetery was located in relation to the Fairbrook property, who owned the subject vacant parcel of land and whether the Rural Hill Cemetery was proposing an expansion of the cemetery onto that parcel, Defendants cannot be held liable under Plaintiffs' theories of fraud pursuant to *Webb, supra*; *McMullen, supra* and *Nieves, supra*.

As the Court of Appeals noted in the Opinion in this case, but failed to apply, reliance can be unreasonable as a matter of law; citing *Nieves, supra* at 464-465. (Appendix p. 18a). See also *Novak v Nationwide Mut Ins Co, supra* at 691.

III.

THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE DEALS ON PLAINTIFFS THEORIES OF FRAUD REGARDING THE PROPOSED EXPANSION OF THE CEMETERY BECAUSE THE ALLEGED REPRESENTATION RELATED TO A FUTURE EXPECTATION.

A. STANDARD OF REVIEW.

The DEALS reassert and incorporate herein by reference the standard of appellate review set forth herein at pages 1-3.

B. A FRAUD ACTION CANNOT BE BASED UPON A REPRESENTATION REGARDING A FUTURE EVENT.

It is well-settled that an action for fraud cannot be based upon alleged fraudulent representations or omissions regarding a future possibility. For example, in *McMullen v Joldersma, supra*; the Court applied this rule to a case similar to the present case.

In *McMullen, supra*; the defendants sold their party store to plaintiffs on a land contract. The plaintiff purchasers filed suit alleging that defendants fraudulently concealed the material fact that the State of Michigan had plans to construct a highway bypass which would substantially divert other highway traffic away from the party store. The testimony in that case established that approval for the highway bypass was still ongoing several months after plaintiffs purchased the store. Like in the present case, the *McMullen* plaintiff argued that a seller can be liable for a misrepresentation of a future event. However, the Court determined that this argument has no merit and held that since at the time of the purchase the bypass project was a future possibility contingent upon federal approval and funding, the defendants' failure to inform

plaintiffs about the bypass project did not constitute a fraudulent omission. *Id.*

Similarly, in *Roy Annett, Inc v Kerezsy*, 336 Mich 169 (1953), the plaintiff brought a suit for specific performance of an option, and the defendants asserted fraud as their defense. The defendants alleged that they were induced to give the option in reliance on the plaintiff's statements that an apartment building would be constructed on or near the property, that special assessment would be levied against the property, and that a road would be built through the property. The Court applied the rule that "erroneous conjecture as to future events" was not fraud. *Roy Annett, Inc*, 336 Mich at 172 (quoting 26 CJ, Fraud, §25, p. 1087). See also *Van Tassel v McDonald Corp*, 159 Mich App 745, 752 (1987) (holding that statements regarding future events do not constitute a fraud); *Webb, supra* at 473-474, (a future promise or expectation does not constitute fraud as a matter of law.); *Hi-Way Motor Co v International Harvester Co, supra* at 336; ("[An] action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact."). See also *Forge v Smith, supra* at 212 n 41 (1998).

In the present case, the proposed expansion clearly constitutes an uncertain, future event or expectation, which cannot be the basis of a fraud claim as a matter of law. Plaintiffs testified at the time the Circuit Court heard the Motion for Summary Disposition that, to date, there had been no expansion of the improved portion of the cemetery onto the subject vacant parcel. (Appendix Bannon Dep. p. 35a; Haas Dep. pp. 58a-59a). In fact, Elaine Haas testified that she was unaware that there has been any resolution to expand the cemetery and she and her husband have brought their case in front of the planning commission to try to block the proposed cemetery expansion. (Appendix Haas Dep. p. 64a, 81a-85a). Elaine Haas testified:

Q. . . . The Township, have they amended their ordinances in any way, shape or form to allow the expansion of Rural Hill Cemetery on this vacant property?

A. No.

* * *

Q. Ok. As far as you know, does a resolution exist from the Township which approves the Rural Hill Cemetery's plans for expansion?

A. No. (Appendix Haas Dep. pp. 83a-85a).

In addition to Plaintiffs' own admissions, several letters and newspaper articles further support Defendants' argument that the proposed cemetery expansion onto the subject vacant parcel was only a future event/expectation at the time of the sale of the Fairbrook property. On **February 5, 1999**, more than one year after the sale of the Fairbrook property, the City of Northville wrote a letter to the Township of Northville urging the Township to "consider" certain proposed changes to the Township Zoning Ordinance to allow the proposed future expansion. (Appendix Letter of 2/5/99 pp.162a-163a). Similarly, a letter from Land Planning and Design Associates to the Northville Township planner dated **September 21, 1999** indicates that their firm is providing the "preliminary" planning consultation for the "proposed" cemetery expansion and that they "have not yet developed a plan of the proposed cemetery expansion." (Appendix Letter of 9/21/99 p. 164a). Finally, a newspaper article from the Novi News on **December 16, 1999** and an article from the Detroit News on **May 30, 2000** further refer to the fact that the proposed expansion of the cemetery is still merely a future possible event. (Appendix Newspaper Articles of 12/16/99 and 5/30/00 pp.165a, 166a).

Since the proposed expansion of the cemetery onto the subject vacant parcel was merely a future event at the time of Plaintiffs' purchase of the Fairbrook property, Plaintiffs' fraud claims based upon representations concerning this future event must fail as a matter of law. *McMullen, supra; Roy Annett, Inc, supra.*

The trial court properly found the critical elements of a fraud claim, i.e. material false

representation and reliance, were not established by the Plaintiffs. Thus, the trial court properly dismissed Plaintiffs' fraud claims as a matter of law. The Court of Appeals' reversal of summary disposition in favor of the DEALS was clearly erroneous.

IV.

UPON A DE NOVO REVIEW THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO WADE DEAL ON PLAINTIFFS' SILENT FRAUD CLAIM WHEN PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE.

A. STANDARD OF REVIEW.

The DEALS reassert and incorporate herein by reference the standard of appellate review set forth in this Brief at pages 1-3.

B. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY DISPOSITION ON THE PLAINTIFFS' SILENT FRAUD CLAIM AGAINST WADE DEAL WHEN PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE.

The DEALS reassert and incorporated herein by reference Arguments I herein in support of the instant argument.

In Count II of Plaintiffs' Amended Complaint, Plaintiffs allege that WADE and SARAH DEAL are liable for an alleged silent fraud for failing to disclose the City owned the subject vacant parcel adjacent to the Fairbrook property and that the City "intended" or "hoped" to expand the improved portion of the Rural Hill Cemetery onto the subject vacant parcel. (Appendix Complaint ¶110 p. 115a). A claim of silent fraud requires a plaintiff to set forth a more complex set of proofs than required for claims of fraud or innocent misrepresentation. *M&D, supra* at 28.

In *Jaffa v Shackel*, 114 Mich App 626, 640-641 (1982), the elements for establishing silent fraud were set forth as follows:

- (1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its

truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury. . . . The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose. Such an action is one of fraudulent concealment [silent fraud]. (Citations omitted). (Emphasis added).

See also *M&D Inc, supra* at 28.

In the present case, Plaintiffs failed to establish the required elements for a prima facie claim of fraud and/or silent fraud. As set forth in Argument I of this Brief, Defendants did not owe a duty to disclose the City's ownership of the vacant parcel for the cemetery. The DEALS did not owe any duty to know of, or disclose, the possible future expansion of the cemetery onto the vacant parcel. The Court of Appeals' reversal of the grant of summary disposition in favor of the DEALS on the Plaintiffs' silent fraud claim was clearly erroneous.

V.

UPON A DE NOVO REVIEW REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO THE DEALS WAS ERRONEOUS ON PLAINTIFFS' CLAIM OF INNOCENT MISREPRESENTATION WHEN PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CLAIM.

A. STANDARD OF REVIEW.

Defendants reassert and incorporate herein by reference the standard of appellate review set forth herein at pages 3-4.

B. PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE OF INNOCENT MISREPRESENTATION ENTITLING THE DEALS TO SUMMARY DISPOSITION.

In *M&D, Inc, supra*, the Court set forth the requirements to establish a prima facie claim of innocent misrepresentation as follows:

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner

that the injury suffered by that party inures to the benefit of the party who made the representation. *M&D, Inc*, 231 Mich App at 27-28 (citing *United States Fidelity & Guarantee Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981)).

The necessary elements for a claim of innocent misrepresentation have not been established by the Plaintiffs. As set forth in Argument I of this Brief, the Plaintiffs failed to establish that Defendant SARAH DEAL **made any representations** to them since they never met or spoke with Sarah Deal.

Plaintiffs also claim that they would not have entered into the offer to purchase the Fairbrook property if WADE DEAL had not made the alleged representations regarding the adjacent vacant parcel. (Appendix Complaint ¶28 p. 107a). However, as set forth in Argument II of this Brief, Plaintiffs could not have “detrimentally relied” on the alleged **October 25, 1998** representations of WADE DEAL when they entered into the offer the purchase. Again, the offer to purchase was submitted on October 1, 1998. The DEALS accepted the offer on October 5, 1998. (See Appendix Offer to Purchase pp. 122a-123a). The conversation ELAINE HAAS had with WADE DEAL took place 20 days later on October 25, 1998. Thus, Plaintiffs failed to establish the first requirement of an innocent misrepresentation claim.

Plaintiffs also failed to prove the second required element of an innocent misrepresentation claim, that they suffered an injury which inures to the benefit of Defendants. As argued above, Plaintiffs failed to establish that they suffered any injury due to the alleged misrepresentations since Plaintiffs were already legally bound to purchase the Fairbrook property as of the date of the alleged misrepresentations. Similarly, Defendants did not receive any benefit from the alleged representations since they were already entitled to the sale of the property.

VI.

UPON A DE NOVO REVIEW GIVEN THE UNDISPUTED FACTS OF THIS CASE PLAINTIFFS ARE UNABLE TO ESTABLISH A CLAIM OF FRAUD UNDER ANY THEORY BY CLEAR AND CONVINCING EVIDENCE.

A. STANDARD OF REVIEW.

Defendant/Appellants reassert and incorporate herein by reference the standard of appellate review previously set forth herein at pages 1-3.

B. PLAINTIFFS HAVE TO ESTABLISH THEIR CLAIMS OF FRAUD BY CLEAR AND CONVINCING EVIDENCE.

In this Court's Order granting leave to appeal to the Defendant/Appellants, dated December 3, 2003, the Court directed the parties to include among the issues to be briefed before the Court "whether a fraud claim must be proved by clear and convincing evidence." (Appendix p. 167a). Defendant/Appellants assert past precedent of this Court and the Court of Appeals requires a plaintiff alleging any type of fraud claim to prove said claim by clear and convincing evidence. *Flynn v Korneffel*, 451 Mich 186, 199 (1996); *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459 (1996); *Hi Way Motor Co v Int'l Harvester, supra*, at 336 (1976); *Groening v Opsata*, 323 Mich 73, 77 (1948).

In *Groening, supra*; this Court stated:

Fraud may not be presumed nor may it be lightly inferred. The burden rests on those relying thereon as the basis for recovery of damages to establish by clear and satisfactory proofs. *Baker v. Frischkorn*, 271 Mich 485; *Kirby v. Givson Refreigeratore Co.*, 274 Mich. 395 (103 A.L.R. 1343); *Grigg v. Hanna*, 283 Mich. 443; *Waldbauer v. Hoosier Casualty Co.*, 285 Mich. 405. . . . *Groening* at 77.

In *Mina v General Star Indemnity Co*, 218 Mich App 678 (1996), rev'd on other grounds 555 Mich 866 (1997); the plaintiff was the owner of a business that purchased a fire insurance policy from the defendant which covered real property owned by the plaintiff. The property was

later destroyed by fire. An investigation into the fire by the defendant revealed the fire was intentionally set and the defendant denied the plaintiff's insurance claim on the basis of fraud, false swearing and arson. Plaintiff filed suit against the defendant insurer for denying the insurance claim claiming the plaintiff was entitled to the insurance proceeds for the loss of his property and interruption of his business. The defendant raised the affirmative defenses of arson, fraud and false swearing. At trial, the jury found that plaintiff had misrepresented and concealed material facts or committed fraud and false swearing finding the plaintiff had no cause of action. After a no cause of action verdict against the plaintiff, the plaintiff filed an appeal in the Court of Appeals.

One of the issues raised by the plaintiff in the *Mina* appeal before the Court of Appeals concerned the trial court's jury instructions on the issue of fraud. However, the plaintiff never objected to the jury instructions given by the trial court. On appeal, the plaintiff argued the trial court committed reversible error in the jury instructions regarding the plaintiff's burden of proof as to the defendant's affirmative defense of fraud and false swearing. The trial court instructed the jury that the defendant had to prove its affirmative defense of fraud and false swearing by a preponderance of the evidence. The plaintiff argued the jury should have been instructed that the defendant had to prove the affirmative defense of fraud by clear and convincing evidence. In reaching its decision in this case the Court of Appeals noted the burden of proof in fraud cases has required either clear and convincing proof or proof by a preponderance of the evidence depending upon whether the fraud was alleged in an equity or legal action. In addition, the Court of Appeals noted that in recent years the courts have relied upon the decision in *Hi-Way Motor Co v Int'l Harvester Co*, *supra*; which requires fraud to be proved by "clear, satisfactory and convincing evidence." *Hi-Way Motor Co*, *supra* at 336. After noting various precedents of this

Court over the years; see *Hi-Way Motor Co, supra*; at 684 the Court of Appeals stated:

After considering the above, we are unable to say with any degree of certainty exactly what standard of proof courts should apply in fraud cases. The Supreme Court has alternatively required fraud to be established by a preponderance of the evidence and by clear and convincing proof, with little consistency and no detailed analysis. While the most recent Supreme Court pronouncements regarding the question have stated that fraud must be proved by clear and convincing evidence, n6 we think it unlikely that the Supreme Court would overrule a significant body of case law without at least mentioning that it was doing so. Therefore, unless and until the Supreme Court offers us additional guidance on this issue, we cannot find that the trial court erred in relying on *Campbell, supra*. In *Campbell*, the Supreme Court addressed the identical issue that is presented in the present case. The Supreme Court has never overruled *Campbell* and instructed the jury the **defendant had to prove the defense of fraud and false swearing by a preponderance of the evidence**. (Emphasis added). (Footnote n6 omitted). *Mina, supra* at 684-685.

As the Court of Appeals noted earlier in its opinion in *Mina, supra* at 680, in *Campbell v Great Lakes Ins Co*, 228 Mich 636, 638 (1924); this Court

. . . "held that **when an insurer raises fraud and false swearing as an affirmative defense, it is only required to prove the misconduct by a preponderance of the evidence**. *Id.* at 640-641. The Supreme Court has not overruled or otherwise modified its holding in *Campbell*. Notwithstanding this fact, plaintiff argues that the trial court erred in instructing the jury that defendant's **affirmative defense of fraud and false swearing had to be proved by a preponderance of the evidence because most recent Michigan case law holds that the proper burden of proof for allegations of fraud is clear and convincing evidence**. (Emphasis added) *Mina*, at 680.

After conducting an historical analysis of this Court's and the Court of Appeals' cases discussing fraud, these Defendants assert that in cases in which a plaintiff, such as in this case, alleges a cause of action based on fraud, the plaintiff is required to prove fraud by clear and convincing evidence. Defendants further assert that only cases in which this Court has held that fraud must be proved by a preponderance of the evidence involve matters in which fraud is alleged as an affirmative defense. That is not the case in the instant action.

Finally, regardless of whether or not fraud requires clear and convincing evidence or proof by a preponderance of the evidence, the Plaintiffs in this case could not prove fraud by a

preponderance of the evidence or clear and convincing evidence for all of the reasons previously stated herein.

CONCLUSION

The undisputed facts in this case establish WADE and SARAH DEAL did not have personal knowledge regarding the ownership of the vacant parcel adjacent to the residential property the DEALS were selling, nor did the DEALS have personal knowledge of the possible expansion of the Rural Hill Cemetery onto the vacant parcel of land. WADE DEAL merely expressed his opinion regarding the ownership of the vacant parcel. The undisputed evidence in this matter establishes SARAH DEAL never made any representations to the Plaintiffs in this matter. In fact, Plaintiffs' own testimony establishes the Plaintiffs never met or talked to SARAH DEAL. Plaintiffs failed to establish the necessary elements against SARAH DEAL on any fraud theory.

The undisputed facts establish WADE DEAL merely expressed his opinion as to the ownership of the adjacent vacant parcel of land and a buyer's ability to use the property in the future. As a matter of law, this is not enough to state an actionable claim of fraud under any theory.

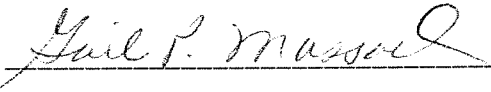
As a matter of law a claim of fraud is not stated if the person alleging the fraud has the means to determine the true information. Reliance on alleged misrepresentations is unreasonable as a matter of law when a person is able to obtain the true information and fails to do so. The Court of Appeals erroneously reversed the grant of summary disposition in favor of the DEALS. To prevent manifest injustice, under the facts of this case, this Honorable Court should reverse the decision rendered by the Court of Appeals and grant costs in favor of the DEALS.

RELIEF REQUESTED

WHEREFORE, Defendants/Appellants, WADE DEAL and SARAH DEAL, respectfully request that this Honorable Court grant their Application for Leave to Appeals and/or enter an order affirming the trial court's order granting summary disposition to Defendant/Appellants. WADE and SARAH DEAL and dismissing Plaintiff/Appellants' Complaint with prejudice and to grant such other and further relief as equity and justice requires in this matter, including costs awarded in favor of the DEALS.

Respectfully Submitted,

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Dated: January 28, 2004

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS CASE NO. 230490 AND
THE WAYNE COUNTY CIRCUIT COURT CASE NO. 99-918983-CH**

ELAINE A. HAAS and CHARLES J. BANNON,

**Supreme Court
Docket No. 123144**

Plaintiffs-Appellees,

**Court of Appeals
No. 230490**

v

**WADE H. DEAL and SARAH J. DEAL,
TRACEY L. DEAL and J.A. DELANEY & CO.,
a Michigan corporation, jointly and severally,
Defendants-Appellants.**

**Wayne County Circuit Court
Case No. 99-918983-CH
Hon. Michael J. Callahan**

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**DEFENDANT/APPELLANTS'
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PROOF OF SERVICE**

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Tami Walsh, being first duly sworn, deposes and says that she is employed by the law firm of CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., attorneys for the Defendants/Appellants WADE and SARAH DEAL in the above-entitled cause of action, and that she did serve 2 true copies of the following document(s) in the manner specified below:

DOCUMENTS SERVED: DEFENDANT/APPELLANTS' WADE AND SARAH
 DEAL BRIEF ON APPEAL WITH PROOF OF SERVICE,
 and DEFENDANT/ APPELLANTS' APPENDIX

DATE SERVED: JANUARY 28, 2004

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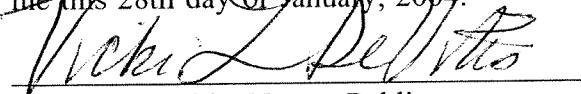
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ABOVE.


TAMI WALSH

Subscribed and sworn to before
me this 28th day of January, 2004.


Vicki L. DeVitis, Notary Public
Wayne County, Michigan
My commission expires: 03/14/06